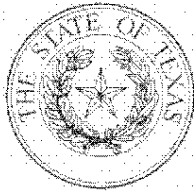


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

December 9, 2013

Anne Idsal, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-13-4345; TCEQ Docket No. 2012-1867-PST-E; *In Re: DEFY, INC. D/B/A SHOP N SAVE FOOD MART***

Dear Ms. Idsal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than December 30, 2013. Any replies to exceptions or briefs must be filed in the same manner no later than January 8, 2014.

This matter has been designated **TCEQ Docket No; SOAH Docket No. 582-13-4345**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script, reading "Sarah G. Ramos".

SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SRG/vg
Enclosures
cc: Mailing List

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512.475.4993 (Main) 512.475.3445 (Docketing) 512.322.2061 (Fax)
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STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: DEFY INC DBA SHOP N SAVE FOOD MART
SOAH DOCKET NUMBER: 582-13-4345
REFERRING AGENCY CASE: 2012-1867-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ SARAH G. RAMOS**

REPRESENTATIVE / ADDRESS

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**SOAH DOCKET NO. 582-13-4345
TCEQ DOCKET NO. 2012-1867-PST-E**

**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,**

Petitioner

v.

DEFY, INC.

D/B/A SHOP N SAVE FOOD MART,

Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Alleging violations of the Texas Water Code and Texas Administrative Code, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$15,475 in administrative penalties against and obtain corrective action from Defy Inc. d/b/a Shop N Save Food Mart (Respondent). The ED alleges that Respondent failed to: (1) provide proper corrosion protection for underground storage tanks (USTs); (2) report a suspected release to the TCEQ within 24 hours of discovery; and (3) investigate a suspected release within 30 days of discovery.

Finding the evidence supports the allegations, the Administrative Law Judge (ALJ) recommends that the Commission assess the requested penalty and order corrective action.

I. PROCEDURAL HISTORY AND JURISDICTION

Notice and jurisdiction were not disputed. The attached Proposed Order contains the required Findings of Fact and Conclusions of Law concerning those matters.

The hearing convened on October 10, 2013, before ALJ Sarah G. Ramos in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff Attorney Phillip M. Goodwin represented the ED, and attorney Richard P. Corrigan represented Respondent. The record closed that same day.

Prior to the hearing and in response to the ED's motion, the ALJ found that the ED's Requests for Admission had been deemed admitted because Respondent failed to respond to them. Pursuant to Order No. 2, issued September 24, 2013, the ALJ determined that Respondent would not be allowed to offer information that contradicted the admissions. Respondent did not challenge the order by attempting to offer contradictory evidence at the hearing.

II. EVIDENCE

A. Background

The Commission is authorized to assess an administrative penalty against a person who violates a provision of the Texas Water Code or a rule adopted under it.¹ The penalty may not exceed \$10,000 per day for each violation.² Additionally, the Commission may order the violator to take corrective action.³

Respondent owns and operates a UST system and convenience store with retail sales of gasoline at 10008 Broadway Street in San Antonio, Texas (the facility). The facility includes three USTs. The facility is considered a minor source facility because it has less than 50,000 gallons throughput monthly. Respondent has no adverse compliance history.

On June 20, 2011, University of Texas at Arlington investigator Herbert Moss inspected Respondent's USTs.⁴ No longer employed by the university, Mr. Moss did not testify at the hearing. However, the person who supervised him at the time, Sylvia Janie Munoz, testified that she had reviewed his report and agreed with his findings.⁵ Respondent signed the investigative report during his exit interview with Mr. Moss on June 20, 2011.⁶

¹ Tex. Water Code § 7.051.

² Tex. Water Code § 7.052(c); Acts 1997, 75th Leg., ch. 1072, Sec. 2, eff. Sept. 1, 1997.

³ Tex. Water Code § 7.073.

⁴ Mr. Moss's investigative report was issued on August 7, 2012. ED Ex. 1.

⁵ Ms. Munoz is the Team Leader for Petroleum Tank Field Operations at the University of Texas at Arlington.

⁶ ED Ex. 1 at 14.

B. Failure to Have Corrosion Protection for the UST System

Owners and operators of USTs must comply with certain Commission requirements,⁷ including having proper corrosion protection.⁸ At least once every month, an owner of USTs must monitor a UST system for release.⁹

Ms. Munoz testified that Respondent's tanks are registered as steel tanks, and they must have corrosion protection or the tanks will rust and possibly leak. Respondent's USTs have an impress current system to check for corrosion, and a rectifier box controls the electrical flow for the system. The rectifier box was in the "off" position when Mr. Moss was at Respondent's location on June 11, 2011. Ms. Munoz said the rectifier box has to be in the "on" position for proper corrosion protection and monitoring. Ms. Munoz did not know whether the investigator turned on the rectifier to determine whether it was working, but Mr. Moss indicated that the system needed to be repaired. Ms. Munoz acknowledged that there was no actual release, but documents available to her show that the corrosion protection system was not repaired until January 12, 2012.

An impress current system requires a tri-annual test by a certified corrosion specialist to verify that it is functioning correctly. Mr. Moss asked for copies of the tri-annual testing, but the result was not sent to Mr. Moss until sometime later. That report showed that a tri-annual testing was conducted on January 30, 2012, about seven months after the inspection.¹⁰ The system passed the tri-annual corrosion protection test.

Clinton Sims is a TCEQ Enforcement Coordinator. He has participated in about 500 TCEQ enforcement cases, 20 of which went to hearing. He testified that TCEQ's Penalty

⁷ Tex. Water Code § 26.3475(a), (c)(1), and (d) (requiring compliance with Commission requirements for tank integrity assessment and for corrosion protection).

⁸ Tex. Water Code § 26.3475(d) and 30 Tex. Admin. Code. § 334.49(a)(1).

⁹ 30 Tex. Admin. Code § 334.50(b)(1)(A).

¹⁰ ED Ex. 5.

Policy¹¹ serves as a guideline for calculating administrative penalties. Using the Penalty Policy, Mr. Sims prepared a Penalty Calculation Worksheet (PCW) for this case.¹²

Mr. Sims stated that the Penalty Policy's base penalty for failure to have corrosion protection is \$10,000. He categorized the violation as a single potential major violation under the Environmental, Property, and Human Health Matrix because petroleum could have leaked into the soil and water if the tank had corroded and a leak resulted. Because the violation was only potential and did not result in a release, Mr. Sims used a 25% multiplier times the \$10,000 base penalty to derive a \$2,500 base penalty for this violation. Respondent eventually corrected the violation; therefore, Mr. Sims deducted the amount of \$625, or 25% of \$2,500, for Respondent's good faith efforts to comply. This netted a penalty of \$1,875 for this violation.

C. Failure to Report a Suspected Release to the TCEQ within 24 Hours of Discovery

A statistical inventory reconciliation records report (SIR) can show a "pass," "fail," or "inconclusive" result for inventory reconciliation¹³ When an SIR does not show a "pass," the result must be reported to TCEQ within 24 hours.¹⁴

During the investigation in June 2011, the investigator saw an inconclusive result on Respondent's SIR records for May 2011,¹⁵ but Respondent had not reported a suspected release to TCEQ. The re-run report for the UST for May 2011 showed that the system passed,¹⁶ but the report was not re-run until September 12, 2012, approximately 15 months after the investigation.¹⁷

¹¹ ED Ex. 4.

¹² ED Ex. 7.

¹³ 30 Tex. Admin. Code § 334.50(d)(9)(A)(iii)(V).

¹⁴ 30 Tex. Admin. Code §§ 334.72 and 334.50(d)(9)(A)(iv).

¹⁵ ED Ex. 1 at 15-16.

¹⁶ ED Ex. 6 at 5.

¹⁷ ED Ex. 6 at 1.

For this second violation, Mr. Sims used the Programmatic Matrix because it was a records violation. Mr. Sims considered the violation a major programmatic violation because the report was not submitted. From the base penalty of \$10,000, he used a 10% multiplier and testified he did so in accordance with the Penalty Policy. That netted a \$1,000 proposed penalty. Mr. Sims also prepared an economic benefit worksheet and determined Respondent avoided the cost of \$100 by not filing the report.

D. Failure to Investigate a Suspected Release within 30 Days of Discovery

Owners or operators of USTs must investigate and confirm all suspected releases of regulated substances within 30 days.¹⁸ Respondent did not investigate the inconclusive result on the SIR for May 2011,¹⁹ and an inconclusive result is considered a suspected release.

Ms. Sims said this was a potential major violation on the Environmental, Property, and Human Health Matrix because of the potential for release. From the \$10,000 base penalty, Mr. Sims testified that he made a 25% adjustment in compliance with the Penalty Policy, to derive a \$2,500 base penalty for the violation. Instead of using a 14-month multiplier for each month when the release was not investigated, Mr. Sims chose a multiplier that represented five quarters. He said this practice is consistent with other enforcement cases for the same violation. The resulting penalty is \$12,500 for the five events.

¹⁸ 30 Tex. Admin. Code § 334.74.

¹⁹ ED 7 at 7.

E. Penalty Calculation Summary

As reflected on the first page of the PCW, the total base penalty for the violations is \$16,000, which includes base penalties of \$2,500 for the first violation, \$1,000 for the second violation, and \$12,500 for the third violation. From the total base penalty, Mr. Sims deducted \$625 for Respondent's good faith efforts to comply with corrosion protection requirements (violation 1). He added the avoided cost of \$100 for violation 2, the failure to report a suspected release to the TCEQ within 24 hours of discovery. Those calculations netted a final penalty amount of \$15,475. Mr. Sims said that amount complies with legal authority and the Penalty Policy and is consistent with recommended penalties in other cases.

F. Corrective Action

Mr. Sims testified that the ED seeks only one item of corrective action: that Respondent establish and implement a process for investigating and reporting suspected releases in accordance with 30 Texas Administrative Code § 334.72.

III. DISCUSSION AND ANALYSIS

Based on Mr. Moss's report and Ms. Munoz's testimony, the evidence establishes that the violations occurred. As a result, the ALJ finds that Respondent violated Texas Water Code § 26.3475(d) and 30 Texas Administrative Code §§ 334.49(a)(1), 334.72, and 334.74. Mr. Sims calculated the proposed penalty under the terms of the Commission's 2002 Penalty Policy, and Respondent did not dispute the accuracy of the ED's calculation of the penalty. As a result, the ALJ concludes that a penalty of \$15,475 and the proposed corrective action is consistent with the factors in Texas Water Code § 7.053, TCEQ rules, and the 2002 Penalty Policy. The penalty proposed by the ED and recommended by the ALJ is commensurate with the severity of the violations and is reasonable.

IV. RECOMMENDATION

The ALJ recommends that the Commission adopt the attached Proposed Order finding that the alleged violations occurred, assessing a \$15,475 penalty against Respondent, and ordering Respondent to establish and implement a process for investigating and reporting suspected releases.

SIGNED December 9, 2013.

A handwritten signature in black ink, appearing to read "Sarah G. Ramos", is written over a horizontal line.

**SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND
ORDERING CORRECTIVE ACTION BY
DEFY, INC. D/B/A SHOP N SAVE FOOD MART
TCEQ DOCKET NO. 2012-1867-PST-E,
SOAH DOCKET NO. 582-13-4345**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission assess administrative penalties against and require corrective action by Defy Inc. d/b/a Shop N Save Food Mart (Respondent). A Proposal for Decision (PFD) was presented by Sarah G. Ramos, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the EDPRP on October 10, 2013, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Respondent owns and operates a convenience store with retail sales of gasoline at 10008 Broadway Street in San Antonio, Texas (the facility). The facility includes three underground storage tanks (USTs).
2. The facility is considered a minor source facility because it has less than 50,000 gallons throughput monthly.
3. Respondent has no adverse compliance history.
4. The USTs at the facility are not exempt or excluded from regulation under the Texas Water Code or the Commission's rules.

5. On June 20, 2011, University of Texas at Arlington investigator Herbert Moss went to the facility and inspected Respondent's USTs. Based on his inspection Mr. Moss documented that Respondent failed to:
 - provide proper corrosion protection for USTs;
 - report a suspected release to the TCEQ within 24 hours of discovery; and
 - investigate a suspected release within 30 days of discovery.
6. On March 21, 2013, the ED filed his EDPRP and mailed a copy of it to Respondent at its address of record.
7. In the EDPRP, the ED alleged that Respondent had violated Tex. Water Code § 26.3475(d) and 30 Tex. Admin. Code §§ 334.49(a)(1), 334.72 and 334.74. The ED proposed administrative penalties of \$15,475 for these violations.
8. The ED also recommended that Respondent be required to take the corrective action that is set out in the Ordering Provisions below.
9. On April 9, 2013, Respondent requested a hearing.
10. On May 10, 2013, the ED filed a letter asking the Commission's Chief Clerk to refer this case to SOAH for hearing, and the Chief Clerk referred it to SOAH on July 24, 2013.
11. On August 1, 2013, the Chief Clerk mailed a notice of hearing to the Respondent, the ED, and the Office of Public Interest Counsel.
12. The notice of hearing stated the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and the matters asserted.
13. On June 20, 2013, the ALJ convened the preliminary hearing at the SOAH hearing facility in Austin, Texas, to establish jurisdiction over the contested case and to set a procedural schedule leading to a hearing on the merits.
14. On October 10, 2013, the ALJ convened the hearing on the merits at the SOAH hearing facility in Austin, Texas. Staff Attorney Phillip M. Goodwin represented the ED, and attorney Richard P. Corrigan represented Respondent. The record closed at the conclusion of the hearing the same day.
15. Respondent failed to provide proper corrosion protection for its USTs.
16. After receiving an inconclusive result on a statistical inventory reconciliation record report, Respondent failed to report a suspected release to the TCEQ within 24 hours of discovery.

17. Respondent failed to investigate a suspected release within 30 days of discovery.
18. The Commission has adopted a Penalty Policy effective September 1, 2002, setting forth its policy regarding the computation and assessment of administrative penalties.
19. The ED accurately calculated the \$15,475 administrative penalty in accordance with the Commission's Penalty Policy.

II. CONCLUSIONS OF LAW

1. Under Tex. Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or the Texas Health & Safety Code within the Commission's jurisdiction or any rule, order, or permit adopted or issued thereunder.
2. The penalty may not exceed \$10,000 per violation, per day, for each of the violations at issue in this case. Tex. Water Code § 7.052.
3. In determining the amount of an administrative penalty, Tex. Water Code § 7.053 requires the Commission to consider several factors, and the Penalty Policy implements those factors.
4. The Commission may order a violator to take corrective action. Tex. Water Code § 7.073.
5. SOAH has jurisdiction over matters related to the hearing in this case, including the authority to issue a PFD with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
6. The ED has the burden of proof in this case by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(d).
7. As required by Tex. Water Code § 7.055 and 30 Tex. Admin. Code § 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, penalties, and corrective actions proposed therein.
8. As required by Tex. Gov't §§ 2001.051 and 2001.052; Tex. Water Code § 7.058; and 30 Tex. Admin. Code §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective actions.
9. As the owner of the facility, Respondent is responsible for its compliance with TCEQ rules pursuant to 30 Tex. Admin. Code §§ 334.1(b)(3) and 334.2(73).

10. Respondent violated Tex. Water Code § 26.3475(d) and 30 Tex. Admin. Code §§ 334.49(a)(1), 334.72 and 334.74.
11. The penalty and corrective action that the ED proposed for Respondent's violations considered in this case conform to the requirements of Tex. Water Code ch. 7 and the Commission's Penalty Policy.
12. The Respondent should be assessed a total of \$15,475 in penalties for the violations considered in this case and ordered to take the corrective actions proposed by the ED and described in the Ordering Provisions below.

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Commission Order, Defy Inc. d/b/a Shop N Save Food Mart shall pay an administrative penalty in the amount of \$15,475 for its violations of Tex. Water Code § 26.3475(d) and 30 Tex. Admin. Code §§ 334.49(a)(1), 334.72, and 334.74.
2. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Defy Inc. d/b/a Shop N Save Food Mart, TCEQ Docket No. 2012-1867-PST-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088
3. The payment of the administrative penalty and the performance of all corrective action listed herein will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.
4. Within 30 days after the effective date of this Order, Respondent shall establish and implement a process for investigating and reporting suspected releases in accordance with 30 Tex. Admin. Code § 334.72.
5. Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
with a copy to:

Waste Section Manager
Texas Commission on Environmental Quality
San Antonio Regional Office
14250 Judson Road
San Antonio Texas 78233-4480

6. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Order.
7. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
8. The effective date of this Order is the date the Order is final. 30 Tex. Admin. Code § 80.273 and Tex. Gov't Code § 2001.144.
9. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
10. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman
For the Commission